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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1238

DEPARTMENT OF REVENUE, State of Washington,
Petitioner,
v.
THE CARRINGTON COMPANY,
a Washington Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF WASHINGTON

RESPONDENT'S BRIEF IN OPPOSITION

DAVID W. SANDELL
GARY E. FLUHRER
Counsel for Respondent

Office & P.O. Address:
FOSTER, PEPPER & RIVIERA
4400 Seattle 1st National Bank Bldg.
Seattle, WA 98154
Telephone: (206) 447-4400

CRAFTSMAN ● MUT PRESS ● SEATTLE, WASHINGTON

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent prays that a Writ of Certiorari to review the judgment of the Supreme Court of Washington be denied.

OPINION BELOW

The opinion of the Washington Supreme Court is reproduced in Appendix A of Petitioner's brief and is reported at 84 Wn.2d 444, 527 P.2d 74 (1974).

JURISDICTION

Respondent submits that this Court lacks jurisdiction under 28 U.S.C. §1257(3) because the Washington Supreme Court's decision is supported by an adequate and independent state ground, as set forth in the Argument.

QUESTION PRESENTED

Is taxpayer Carrington Corporation immune from a state retail excise tax which accrues upon delivery of the goods to the purchaser when (i) the goods are purchased pursuant to individual purchase orders, each of which specifies a particular item, a named overseas recipient and a named overseas destination and the goods are in fact so delivered and (ii) upon leaving Carrington's warehouse the goods are transported to purchaser's facility and, after a 7 or 8 day period for inspection and packaging at the purchaser's facility, are placed aboard ships or airplanes completing their journey to the foreign destination?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article I, Section 10, Clause 2.

Revised Code of Washington 82.04.250. (Appendix A)

Washington Administrative Code (WAC) 458-20-193 (c). (Appendix A)

COUNTERSTATEMENT OF THE CASE

State tribunals, responsive to local needs for revenue, are never predisposed to recognize tax immunities. Consequently, few claims of immunity survive scrutiny by state courts; this case represents one of them.

Petitioner Department of Revenue assessed Respondent Carrington Corporation $29,341.01 in retailing excise taxes (Revised Code of Washington 82.04.250) and interest resulting from Carrington's sale of machinery parts for export to military establishments in Southeast Asia, Korea and Japan. Carrington sued for a refund based upon the constitutional tax immunity granted exports (U.S. Consti-

tution, Article I, Section 10, Clause 2) and based upon the administrative rules of Petitioner Department of Revenue granting exports tax immunity (Washington Administrative Code 458-20-193(c)). Both the trial court and the Washington Supreme Court held the Department's tax assessment incorrect based upon the constitutional immunity and the Department's own rules.

Respondent can add little to the case as stated by the Washington Supreme Court:

> Turning to the facts, we find that plaintiff [Carrington] was a successful bidder to supply parts and equipment of a specified make to the General Services Administration of the United States (GSA). From the invitation to bid to the accomplished fact, all such items were destined for and delivered to military installations in Southeast Asia, Korea and Japan. All sales in the relevant period of 1967-71 were pursuant to individual GSA purchase orders, each of which identified a particular part, a named overseas recipient and a specific overseas destination. Pursuant to the purchase order requirements, the shipments were trucked from Seattle to GSA's Tacoma packing facility. The Tacoma facility had been established for the sole purpose of packing items for overseas shipment to United States military establishments. On the average, materials were at the packing operation for only seven or eight days before being loaded on a ship or airlifted out. During that time they were inspected for compliance with specifications and packaged for overseas shipment.
>
> From these facts, the [trial] court concluded that when the items were loaded on the trucks in Seattle it was certain they were destined for export, that they then entered the export stream and that the packing in Tacoma was not a break in the stream of export, but in furtherance of it. We agree.
>
> *Carrington Co. v. Dept. of Revenue*, 84 Wn.2d 444, 447-48, 527 P.2d 74, 76-77 (1974).

ARGUMENT IN OPPOSITION TO PETITION FOR CERTIORARI

1. The Washington Supreme Court decision in *Carrington* is supported by an adequate and independent state ground. *Herb v. Pitcairn*, 324 U.S. 117 (1944).

Under its rule-making authority, Petitioner Department of Revenue has promulgated regulations governing the taxation of exports (Washington Administrative Code 458-20-193(c)). This regulation provides as follows:

> A deduction is allowed with respect to *export sales* when as a necessary incident to the contract of sale the seller agrees to, and does deliver the goods (1) to the buyer at a foreign destination; or (2) to a carrier consigned to and for transportation to a foreign destination; or (3) to the buyer at shipside or aboard the buyer's vessel *or other vehicles of transportation under circumstances where it is clear the goods will be taken to a foreign destination.*
>
> (Emphasis added.)

The Washington Supreme Court in *Carrington* based its decision upon this regulation:

> Finally, the state's own administrative rule, WAC 458-20-193(c), acknowledges that something short of delivery at dockside will constitute entry into the export stream. It states that it is sufficient if there is delivery to 'other vehicles of transportation under circumstances where it is clear the goods will be taken to a foreign destination.' Those are the circumstances here; it is clear and the trial court was correct.
>
> 84 Wn.2d at 448-49, 527 P.2d at 77.

2. Petitioner asserts that certiorari should be granted because of the alleged inconsistency between the instant case and *Kosydar v. National Cash Register Co.*, 417 U.S. 62 (1974). No conflict exists between the instant case and *Kosydar*.

Kosydar v. National Cash Register Co. (*NCR*), this Court's most recent export case, was decided after *Carrington* had been submitted to and argued before the Washington Supreme Court. The Washington court in *Carrington* nonetheless synthesized correctly past export decisions and applied the same legal test enunciated by this Court in *Kosydar*.

The Ohio Supreme Court in *Kosydar* held business machines committed to export but held often indefinitely in NCR's international warehouse awaiting shipment and export arrangements were constitutionally immune from personal property tax. Although the Ohio court recognized that past decisions of this Court required both certainty of export and actual entrance into the export stream before the constitutional immunity attached, the Ohio court nonetheless held that certainty of export standing alone was sufficient to invoke the immunity. After granting certiorari to correct this misinterpretation of past export decisions, this Court stated in *Kosydar*:

> We may accept as fact the respondent's assurances that the prospect of eventual exportation here was virtually certain. But that prospect, no matter how bright, does not start the process of exportation. On the tax date the movement to foreign shores had neither started nor been committed. *Empresa Siderurgica, supra,* at 157. Given the absence of an entrance of the respondent's machines into the exporting stream, the immunities of the Export-Import Clause are unavailable.
>
> 94 S. Ct. at 2113.

Relying upon the same authority, the Washington court in *Carrington* enunciated an identical rule, requiring both certainty of export and an actual entrance into the export stream before the constitutional immunity attaches:

> To enjoy the constitutional protection as an export, *goods must have entered the export stream with certainty of a foreign destination*. Neither intent to export nor the ultimate fact of actual exportation alone is sufficient to invoke the immunity. *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946); *Empresa Siderurgica, S.A. v. County of Merced*, 337 U.S. 154 (1949).
>
> (Emphasis added.) 84 Wn. 2d at 445, 527 P.2d at 75.

Petitioner in its brief fails to cite an export case decided by the Washington Supreme Court on November 14, 1974, approximately one month after *Carrington*, specifically affirming the Washington court's long adherence to the legal principles set forth by this Court in *Kosydar*:

> The crucial test of entrance into the stream of foreign commerce has been very recently reaffirmed in *Kosydar v. National Cash Register Co.*, 417 U.S. 62 (1974), in which the court noted there must be 'actual movement' of the goods to remove them from the ambit of state taxation.
>
> This court has long recognized the validity of the indicated test, and the inherent legal principles prescribing the limits of state taxing authority.
>
> *City of Tacoma v. General Metals of Tacoma, Inc.*, 84 Wn.2d 560, 563, 527 P.2d 1314, 1316 (1974).

Petitioner's broad assertion that the instant case is inconsistent with this Court's decision in *Kosydar* thus is not supported by an analysis of those two cases and is specifically refuted by the Washington court's own language in *City of Tacoma v. General Metals of Tacoma, Inc.*, *supra*.

3. The instant case does not present a substantial legal question warranting this Court's review.

Because the legal test applied by the Washington court in *Carrington* is in accord with past export decisions and this Court's decision in *Kosydar,* the gist of Petitioner's argument before this Court, as before the Washington Supreme Court, rests upon what it believes to be an incorrect analysis of the facts peculiar to the instant case. Specifically, Petitioner desires this Court to reexamine the facts which led to Washington courts to conclude that the machine parts in question entered the export stream upon leaving Carrington's warehouse. Respondent submits that such a reexamination, essentially factual in nature, does not warrant this Court's review.

> We do not grant a certiorari to review evidence and discuss specific facts.
>
> *United States v. Johnston,* 268 U.S. 220, 227 (1925).

The facts peculiar to the instant case are not of great public significance, even between the parties before this Court. As stated by the trial court in its findings of fact, the GSA facility involved in this litigation is itself being closed due to the general disengagement in Southeast Asia.

4. Petitioner asserts that the Washington Supreme Court's decision in *Carrington* is in conflict with the decision of the United States Court of Appeals for the Ninth Circuit in *Sumitomo Forestry Company, Ltd. of Japan v. Thurston County, Washington,* 504 F.2d 604 (9th Cir. 1974). No conflict in reasoning exists between these two decisions.

Sumitomo was decided after *Carrington* had been submitted to and argued before the Washington Supreme Court. Both cases were decided at approximately the same

time, *Carrington* on October 10, 1974, and *Sumitomo* on October 8, 1974. This proximity in the decisions precluded either court from citing or examining the result or reasoning of the other. Petitioner's asserted inconsistency therefore arises from its own analysis, as neither court has had an opportunity to entertain argument on both decisions.

The factual settings of the instant case and *Sumitomo* differ markedly. In *Sumitomo*, the Ninth Circuit held that Thurston County was not prohibited by the constitutional export immunity from levying an *ad valorem* tax on logs stored at the Port of Olympia awaiting shipment, the average storage delay being 45 days. The *Sumitomo* court based its decision on the reasoning that at the time the tax was levied the logs were still in storage and had not yet entered the constitutionally immune export stream. In *Carrington*, on the ther hand, the Washington court found that at the time the tax accrued each machine part in question had been delivered to the packing facility and that actual movement into the export stream had already commenced.

While the results of these two decisions are opposed, both courts correctly framed the issue presented in the same terms enunciated by this court in *Kosydar*: whether or not the property sought to be taxed had actually entered the export stream at the time the tax accrued. The thrust of Petitioner's argument in asserting an inconsistency again is directed at whether the two courts analyzed the facts peculiar to each case correctly, not at whether the courts framed the legal issue correctly.

The dozen cases now pending in Washington arising out of the *ad valorem* taxation of logs being exported to

Japan which Petitioner refers to in its brief parallel the facts of the *Sumitomo* decision, not the instant case. If Petitioner is concerned about the validity of local Washington bodies taxing logs being exported to Japan, certiorari should be sought in the factual context of one of those cases, if and when a conflict develops, not by extropolating the facts of the instant case to resolve a hypothetical conflict that has not yet been examined by lower courts.

5. Petitioner asserts that the question of whether the United States Government purchasing for export falls within the ambit of the Export-Import Clause is novel.

The Washington Supreme Court in *Carrington* summarily answered this contention:

> . . . While most export cases involve a foreign purchaser, there is no authority that such is an implied requirement of the constitutional provision. Indeed it has been held that the United States, as a buyer for export, is entitled to the benefit of the prohibition against taxes on exports. *Union Oil Co. v. Los Angeles*, 227 Cal. App. 2d 608, 38 Cal. Rptr. 923 (1964).
>
> 84 Wn.2d at 445, 527 P.2d at 75.

CONCLUSION

For the above reasons, a writ of certiorari to review the judgment of the Washington Supreme Court should be denied.

Respectfully submitted,

DAVID W. SANDELL
GARY E. FLUHRER
Counsel for Respondent

APPENDIX A

82.04.250 — Tax on Retailers. Upon every person except persons taxable under subsection (9) of RCW 82.04.-260 engaging within this state in the business of making sales at retail, as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of forty-four one-hundredths of one percent.

WAC 458-20-193(c):

FOREIGN COMMERCE

Foreign commerce means that commerce which involves the purchase, sale or exchange of property and its transportation from a state or territory of the United States to a foreign country, or from a foreign country to a state or territory of the United States.

IMPORTS. An import is an article which comes from a foreign country (not from a state, territory or possession of the United States) for the first time into the taxing jurisdiction of a state. It includes the sale by the importer of goods in its original unbroken package or container in which they were imported. Such goods remain imports when all of these following factors exist: The goods remain (1) in the original unbroken package or container, (2) the property of the importer, and (3) are not put to the use for which they were imported, or (4) commingled with the general mass of property in this state. It also includes fish, sea food or other products originating on the high seas beyond the territorial limits of the state; however, such products lose their distinctive character as imports when they are processed, handled or sold within this state. Such products then become commingled with the general mass of property in this state and the sale thereof is taxable.

EXPORTS. An export is an article which originates within the taxing jurisdiction of the state destined for a purchaser in a foreign country. Thus ships stores and supplies are not exports.

BUSINESS AND OCCUPATION TAX

WHOLESALING AND RETAILING

IMPORTS. Sales of imports by an importer or his agent are not taxable and a deduction will be allowed with respect to the sales of such goods, if, at the time of sale such goods are in the original and unbroken package or container in which the same are imported even though the goods were located in this state at the time of the sale and the transfer of title and possession occur in this state. Immunity from tax does not extend: (1) to the sale of imports by the importer thereof or his agent if such goods are sold other than in the original unbroken package or container; nor (2) to the sale in this state of imports by any person other than the importer or his agent whether or not in the original unbroken package or container; nor (3) to the sale of imports subsequent to the time they have been placed in use in this state for the purpose for which they were imported; nor (4) to sales of products which, although imports, have been processed or handled within this state or its territorial waters.

EXPORTS. A deduction is allowed with respect to export sales when as a necessary incident to the contract of sale the seller agrees to, and does deliver the goods (1) to the buyer at a foreign destination; or (2) to a carrier consigned to and for transportation to a foreign destination; or (3) to the buyer at shipside or aboard the buyer's vessel or other vehicle of transportation under circumstances where it is clear the goods will be taken to a foreign destination.

In all circumstances there must be (a) a certainty of export and (b) the process of export must have started.

As proof of export the seller must obtain and keep in his files a bona fide bill of lading, in which he is the consignor and by which the carrier agrees to transport the goods sold to a foreign destination; or obtain and keep documentary proof of export duly certified to by the Collector of Customs, showing export of the goods sold.

It is of no importance that title and/or possession pass in this state so long as delivery is made directly to the export channel as above set forth.

Sales of tangible personal property, of ships stores, and supplies to operators of steamships, etc., are not deductible irrespective of the fact that the property will be consumed on the high seas, or outside the territorial jurisdiction of this state, or by a vessel engaged in carrying foreign commerce.